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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LARRY COTA,<br><br>Defendant and Appellant. | B303670<br><br>(Los Angeles County Super. Ct. No. BA123176) |

APPEAL from an order of the Superior Court, Los Angeles County, Craig Richman, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, and Charles S. Lee and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Larry Cota appeals from the superior court's order denying his petition under Penal Code section 1170.95,[1] which allows certain defendants convicted of murder under a felony murder or natural and probable consequences theory to petition the court to vacate their convictions and for resentencing. Cota contends that he alleged a prima facie case for relief and that the superior court violated his rights to due process and counsel by summarily denying the petition without giving his appointed counsel the opportunity to submit additional briefing.

We conclude that Cota's contentions have no merit and that any procedural error by the superior court was harmless because Cota is ineligible for relief under section 1170.95. Therefore, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *A Jury Convicts Cota of Second Degree Murder, and This Court Affirms*

In the late afternoon of November 5, 1995 nine-year-old Hector G. was playing in the front yard of his house when Cota drove his truck through a chain link fence, onto the front yard, and into Hector. A neighbor screamed at Cota, "Stop the truck because there's a kid under the truck and he's been injured." Cota said, "Fuck you," and drove forward and in reverse, in an attempt to disentangle the truck from the fence. When Cota finally broke away from the fence, neighbors ran after him to get him to stop, but he drove off. A sheriff's deputy chased Cota and

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[1] Undesignated statutory references are to the Penal Code.

observed him driving erratically before coming to a stop. When Cota got out of his truck, he appeared intoxicated. A sample of Cota's blood contained 0.18 percent alcohol. Hector died from multiple fractures caused by the collision. (*People v. Cota* (June 23, 1998, B113879) [nonpub. opn.].)

A jury convicted Cota of second degree murder (§ 187, subd. (a)), failing to stop at the scene of an accident resulting in injury or death (Veh. Code, § 20001, subd. (a)), driving under the influence of an alcoholic beverage and proximately causing injury (Veh. Code, § 23153, subd. (a)), and driving a vehicle while having 0.08 percent or more, by weight, of alcohol in his blood and proximately causing injury (Veh. Code, § 23153, subd. (b)).[2] (*People v. Cota*, *supra*, B113879.) The jury also found true the allegation that Cota had two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)).

The trial court sentenced Cota to a prison term of 70 years to life. (*People v. Cota*, *supra*, B113879.) Cota appealed, and we affirmed.

B. *The Legislature Enacts Senate Bill No. 1437*

In 2018 the Legislature enacted Senate Bill No. 1437 (Stats. 2018, ch. 1015, § 4), effective January 1, 2019, "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that

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[2] Cota was convicted in 1991, 1992, and 1993 of driving under the influence of alcohol. After his first conviction, Cota participated in a program for persons convicted of driving under the influence, which consisted of weekly lectures that "emphasized injury as a possible consequence of drinking and driving." (*People v. Cota*, *supra*, B113879.)

murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f); see *People v. Perez* (2020) 54 Cal.App.5th 896, 902; *People v. Verdugo* (2020) 44 Cal.App.5th 320, 325 (*Verdugo*), review granted Mar. 18. 2020, S260493.)[3]

Senate Bill No. 1437 amended the felony murder rule and eliminated the natural and probable consequences doctrine as it relates to murder by amending sections 188 and 189. New section 188, subdivision (a)(3), provides, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (See *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103 ["Now, rather than an objective, reasonable foreseeability standard, . . . pursuant to new section 188, subdivision (a)(3), to be guilty of murder other than as specified in section 189, subdivision (e), concerning felony murder, the subjective mens rea of 'malice aforethought' must be proved."], review granted Nov. 13, 2019, S258175.) New section 189, subdivision (e), provides that, with respect to a participant

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[3] The Supreme Court in *Verdugo* ordered briefing deferred pending its disposition of *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted March 18, 2020, S260598, in which briefing and argument are limited to the following issues: (1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under section 1170.95? (2) When does the right to appointed counsel arise under section 1170.95, subdivision (c)?

in the perpetration or attempted perpetration of a felony listed in section 189, subdivision (a), in which a death occurs (that is, those crimes that provide the basis for first degree felony murder), an individual is liable for murder "only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (See *People v. Lombardo* (2020) 54 Cal.App.5th 553, 556 [under amended section 189, subdivision (e), a participant in a felony in which a death occurs """is liable for murder *only if* one of the [three circumstances specified in the statute] is proven"""]; *People v. Galvan* (2020) 52 Cal.App.5th 1134, 1140 [Senate Bill No. 1437 "eliminated the natural and probable consequences doctrine as a basis for murder liability, and added a requirement for felony murder that a defendant must have been at least a major participant in the underlying felony and have acted with reckless indifference to human life"], review granted Oct. 14, 2020, S264284.)

Senate Bill No. 1437, through new section 1170.95, also authorizes an individual convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate the conviction and to be resentenced on any remaining counts if the individual could not have been convicted of murder under Senate Bill No. 1437's changes to the definition of the crime. (*People v. Tarkington* (2020) 49 Cal.App.5th 892, 896-897 (*Tarkington*), review granted

Aug. 12, 2020, S263219; *Verdugo*, *supra*, 44 Cal.App.5th at p. 326; see § 1170.95, subd. (a).) The petition must include a declaration by the petitioner he or she is eligible for relief under section 1170.95, the superior court case number and year of the petitioner's conviction, and a statement whether the petitioner requests the appointment of counsel. (§ 1170.95, subd. (b)(1); see *Tarkington*, at p. 897; *Verdugo*, at pp. 326-327.) If information "is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." (§ 1170.95, subd. (b)(2); see *People v. Edwards* (2020) 48 Cal.App.5th 666, 672, review granted July 8, 2020, S262481.)

If the petition contains all required information, and the court determines the petition is facially sufficient, section 1170.95, subdivision (c), prescribes a two-step procedure for determining whether to issue an order to show cause: "'The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response . . . and the petitioner may file and serve a reply . . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.'" (*Verdugo*, *supra*, 44 Cal.App.5th at p. 327; see *Tarkington*, *supra*, 49 Cal.App.5th at p. 897.) At the first prima facie step, the superior court performs "'a substantive gatekeeping function, screening out clearly ineligible petitioners before devoting additional resources to the resentencing process.'" (*People v. Edwards*, *supra*, 48 Cal.App.5th at p. 673.) "Based on a threshold review" of the

record of conviction, including the opinion in the petitioner's direct appeal in evaluating the petition under section 1170.95, the court can dismiss a petition if the documents establish "the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding Senate Bill [No.] 1437's amendments to sections 188 and 189." (*Verdugo,* at p. 330; see *Tarkington*, at p. 898; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1138 (*Lewis*), review granted Mar. 18, 2020, S260598.) At the second prima facie step, "if the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, at p. 330; see *Tarkington,* at p. 898.)

If the court determines the petitioner has made a prima facie showing and the court issues an order to show cause, the court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts. (§ 1170.95, subd. (d)(1); see *Verdugo*, *supra*, 44 Cal.App.5th at p. 327.) At the hearing the prosecution has the burden of proving beyond a reasonable doubt the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) The prosecutor and petitioner may rely on the record of conviction or offer new or additional evidence. (See *Tarkington*, *supra*, 49 Cal.App.5th at pp. 898-899; *Lewis*, *supra*, 43 Cal.App.5th at p. 1136.)

C. *Cota Files a Petition Under Section 1170.95, Which the Superior Court Summarily Denies*

On August 2, 2019 Cota filed a petition under section 1170.95, using "a downloadable form petition/declaration prepared by Re:Store Justice, a cosponsor of the legislation (see Sen. Com. on Public Safety, Rep. on Sen. Bill No. 1437 (2017-2018 Reg. Sess.) as amended Feb. 16, 2018, p. 1)." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 324.) Cota checked the boxes next to the following statements: "A complaint, information, or indictment was filed against me that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine"; "At trial, I was convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine"; "I could not now be convicted of 1st or 2nd degree murder because of changes made to Penal Code §§ 188 and 189, effective January 1, 2019"; "I was convicted of 2nd degree murder under the natural and probable consequences doctrine or under the 2nd degree felony murder doctrine and I could not now be convicted of murder because of changes to Penal Code § 188, effective January 1, 2019"; and "I request that this court appoint counsel for me during this re-sentencing process." The superior court reappointed counsel to represent Cota on his petition.

At an October 30, 2019 hearing with the prosecutor and counsel for Cota, the superior court stated, "I haven't looked at anything," and asked the parties for their positions on how the court should proceed. The prosecutor stated that Cota was convicted of a "*Watson* murder,"[4] that "there was only one person

[4] In *People v. Watson* (1981) 30 Cal.3d 290 the Supreme Court held that the People can charge a person who kills another

involved in the case," and that "Cota was the driver." The court asked counsel for Cota "whether this is a case in which [section] 1170.95 applies or not." Counsel for Cota stated, "It does not appear that [Cota] qualifies," but added, "He's entitled to a hearing at least." The court denied the petition "because [Cota] is not eligible for the relief sought."[5] The court's minute order stated, "The defendant is not eligible for relief sought, as he was convicted as the actual killer." Cota timely appealed.

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person while driving under the influence of alcohol with "second degree murder based on implied malice." (*Id.* at p. 300.) The Supreme Court explained that "*malice* may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life." (*Id*. at p. 296; see *People v. Wolfe* (2018) 20 Cal.App.5th 673, 681 ["Malice may be implied when a person willfully drives under the influence of alcohol."].)

[5] Based on the transcript of the October 30, 2019 proceedings, it does not appear that the superior court reviewed the record of conviction before denying Cota's petition. (See *Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-330.) Cota, however, does not argue the superior court erred in failing to examine the record of conviction before determining he was ineligible for relief under section 1170.95.

## DISCUSSION

### A. *The Superior Court Did Not Err in Summarily Denying Cota's Petition Under Section 1170.95*

#### 1. *Cota Failed To State a Prima Facie Case of Eligibility*

Cota contends the superior court erred in summarily denying his petition because he "stated a prima facie claim for resentencing" by "alleging the three require[d] conditions" under section 1170.95, subdivision (a). We review de novo the superior court's ruling that Cota was ineligible for relief as a matter of law. (*People v. Murillo* (2020) 54 Cal.App.5th 160, 167, petn. for review pending, petn. filed Oct. 13, 2020, S264978.)

Cota's recitation in his petition of words mirroring the language of section 1170.95, subdivision (a), did not, without more, state a prima facie case for relief. (See *People v. Law* (2020) 48 Cal.App.5th 811, 820 [courts "have already rejected the argument that a trial court is limited to the allegations in the petition when determining whether the petitioner has stated a prima facie claim for relief under section 1170.95"], review granted July 8, 2020, S262490.) As we explained in *Verdugo*, *supra*, 44 Cal.App.5th 320, when the superior court conducts the first prima facie review of the petition under section 1170.95, subdivision (c), the court must do more than "simply determin[e] whether the petition is facially sufficient." (*Verdugo*, at pp. 328-329.) The court must conduct "a preliminary review of statutory eligibility for resentencing" by examining the record of conviction to assess whether in fact the petitioner "falls within the provisions of [section 1170.95]." (*Verdugo*, at pp. 329-330.) Contrary to Cota's argument, the court does not need to accept as true a petitioner's allegations. (See *People v. Perez*, *supra*,

54 Cal.App.5th at pp. 903-904 [“‘if the record “contain[s] facts refuting the allegations made in the petition . . . the court is justified in making a credibility determination adverse to the petitioner,”’” limited to “‘readily ascertainable facts from the record (such as the crime of conviction), rather than factfinding involving the weighing of evidence or the exercise of discretion’”]; see also *Lewis*, *supra*, 43 Cal.App.5th at p. 1138 [“‘It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations in the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief.’”].)

Our opinion in Cota’s direct appeal established Cota was convicted of second degree murder based on a theory of implied malice, a theory that Senate Bill No. 1437 did not affect. Cota, who had three prior convictions for driving under the influence of alcohol and therefore knew of the dangers of driving while intoxicated, drove with a blood alcohol content of 0.18 percent, crashed into the front yard of a residence and into a fence, and crushed a small child. The trial court instructed the jury with CALJIC No. 8.11, which stated, in pertinent part: “‘Malice is implied when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.’” The trial court also instructed the jury with CALJIC No. 8.51, which stated: “‘If a person causes another’s death while committing a misdemeanor inherently dangerous to human life, the crime is manslaughter. [¶] There are many acts which are lawful but nevertheless endanger human life. If a person causes another’s death by doing such a dangerous act in an unlawful or criminally negligent manner, without realizing

the risk involved, he is guilty of manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder.'" (*People v. Cota*, *supra*, B113879.)

In Cota's direct appeal, we concluded the jury "was adequately instructed regarding the objective standard to be utilized to find gross negligence and the elements necessary to find a person guilty of second degree murder under the theory of implied malice." (*People v. Cota*, *supra*, B113879.) Because the jury found Cota guilty of second degree murder, and not gross negligence, the jury necessarily found Cota acted with implied malice when he drove under the influence of alcohol on November 5, 1995.[6] There is no suggestion in the record, and Cota does not argue, he was charged, tried, or convicted under a felony murder or natural and probable consequences theory.[7] Cota was convicted under "a theory that survive[d] the changes to sections 188 and 189." (*Tarkington*, *supra*, 49 Cal.App.5th at p. 899; see *People v. Soto* (2020) 51 Cal.App.5th 1043, 1057 [Senate Bill No. 1437 "did not exclude from liability persons convicted of murder for acting with implied malice"], review granted Sept. 23, 2020, S263939]; *People v. Cornelius* (2020) 44 Cal.App.5th 54,

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[6] Cota did not challenge the sufficiency of the evidence to support his conviction of second degree murder.

[7] The "natural consequences" language in CALJIC No. 8.11 does not refer to the natural and probable consequences theory. (See *People v. Soto* (2020) 51 Cal.App.5th 1043, 1059 ["The 'natural consequences' language in the instruction for second degree murder does not transform [the defendant's] conviction into one for murder under the natural and probable consequences doctrine within the meaning of section 1170.95."], review granted Sept. 23, 2020, S263939.)

57-58 [Senate Bill No. 1437 amended section 188 "to require that a principal act with express or implied malice"], review granted Mar. 18, 2020, S260410.)

2. *Section 1170.95, Subdivision (c), Did Not Require the Superior Court To Appoint Counsel or Order Briefing Before Determining Cota Was Ineligible for Relief*

Cota argues the superior court erred in summarily denying his petition "without providing defense counsel the opportunity to adequately prepare and represent [him] and without giving defense counsel the opportunity to file additional briefing on [his] petition." Section 1170.95, subdivision (c), does not require the superior court to provide an opportunity for briefing, or even to appoint counsel, before the court makes the initial determination whether the petitioner is eligible for relief under section 1170.95. (See *Verdugo*, *supra*, 44 Cal.App.5th at p. 323 [rejecting the argument that "the superior court lacked jurisdiction to deny his section 1170.95 petition on the merits without first appointing counsel and allowing the prosecutor and appointed counsel to brief the issue of his entitlement to relief"]; accord, *People v. Flores* (2020) 54 Cal.App.5th 266, 272; *People v. Gomez* (2020) 52 Cal.App.5th 1, 16, review granted Oct. 14, 2020, S264033; *Tarkington*, *supra*, 49 Cal.App.5th at p. 901; *People v. Cornelius*, *supra*, 44 Cal.App.4th at p. 58; but see *People v. Cooper* (2020) 54 Cal.App.5th 106, 109 ["the right to counsel attaches upon the filing of a facially sufficient petition that alleges entitlement to relief"], review granted Nov. 10, 2020, S264684.)

Cota argues: "Had the trial court properly appointed counsel and heard from counsel, counsel could have argued that appellant did not act with intent or malice aforethought." As the record demonstrates, however, any argument that counsel for

Cota could have made would not have changed the fact Cota was ineligible for relief under section 1170.95. Therefore, any procedural error was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Epps* (2001) 25 Cal.4th 19, 29 ["the *Watson* harmless error test applies" to the denial of a right that "is purely a creature of state statutory law"]; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252 ["violation of a statutory right to counsel is properly reviewed under the harmless error test enunciated in *People v. Watson*"]; see also *People v. Edwards*, *supra*, 48 Cal.App.5th at p. 675 ["since [the defendant] does not fall within the provisions of section 1170.95 as a matter of law, any of the purported errors [in failing to appoint counsel, ordering briefing, and holding a hearing] were harmless under any standard of review [citations] and remand would be an idle act"].)

B. *The Superior Court Did Not Violate Cota's Sixth Amendment or Due Process Rights*

Cota contends the superior court's summary denial of his petition under section 1170.95 "violated [his] federal constitutional rights to due process and to the assistance of counsel." The law does not support Cota's contention.

"'[T]he retroactive relief . . . afforded by Senate Bill [No.] 1437 is not subject to Sixth Amendment analysis. Rather, the Legislature's changes constituted an act of lenity that does not implicate . . . Sixth Amendment rights.'" (*People v. Perez*, *supra*, 54 Cal.App.5th at p. 908; see *People v. Lopez*, *supra*, 38 Cal.App.5th at pp. 1114-1115; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156-1157.) Moreover, as the Supreme Court has held in the context of post-conviction petitions, "Unless we make the filing of adequately detailed factual allegations stating a prima facie case a condition to appointing counsel, there

would be no alternative but to require the state to appoint counsel for every prisoner who asserts that there may be some possible ground for challenging his conviction. Neither the United States Constitution nor the California Constitution compels that alternative. Accordingly, in the absence of adequate factual allegations stating a prima facie case, counsel need not be appointed either in the trial court or on appeal from a summary denial of relief in that court." (*People v. Shipman* (1965) 62 Cal.2d 226, 232; cf. *In re Clark* (1993) 5 Cal.4th 750, 780 ["if a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns"]; *In re Sanders* (1999) 21 Cal.4th 697, 717, fn. 11 [same].) Because Cota did not make a prima facie showing he is eligible for relief under section 1170.95, the superior court's summary denial of his petition did not deprive him of the assistance of counsel.[8]

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[8] Cota provides no argument in support of his contention, mentioned in a sentence, the superior court violated his due process rights. Therefore, we do not consider it. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363 ["If a party's briefs do not provide legal argument and citation to authority on each point raised, '"the court may treat it as waived, and pass it without consideration."'"]; Cal. Rules of Court, rule 8.204(a)(1)(B).)

## DISPOSITION

The order denying Cota's petition under section 1170.95 is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

RICHARDSON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.